

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-7026

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-7026

INTER-REGIONAL FINANCIAL GROUP, INC.,
Plaintiff-Appellee,

—v.—

CYRUS HASHEMI,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE APPELLANT

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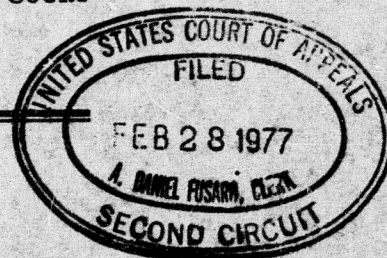


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IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 77-7026

INTER-REGIONAL FINANCIAL GROUP, INC.,

Plaintiff-Appellee

v.

CYRUS HASHEMI,

Defendant-Appellant

BRIEF FOR THE APPELLANT

STATEMENT OF THE CASE

The plaintiff instituted this action on July 28, 1976, by the filing of a complaint in the United States District Court for the District of Connecticut. The complaint was accompanied by an application for a prejudgment remedy, requesting an order attaching certain personal property and bank accounts of the defendant within the State of Connecticut, and an order concerning securities owned by the defendant outside of Connecticut. The application for the prejudgment remedy was referred to the Hon. Jon O. Newman, United States District Judge, who granted the application for a prejudgment

remedy. On December 8, 1976, Judge Newman issued a mandatory injunction directing the defendant to surrender to the Deputy Clerk of the United States District Court in Bridgeport, Connecticut, certificates evidencing publicly traded, marketable securities owned by him, with an aggregate market value of \$312,500, or, if the defendant did not own publicly traded, marketable securities with an aggregate market value of said amount, directing him to surrender privately traded securities or a combination of publicly traded, marketable securities plus privately traded securities, to be attached in the manner authorized by the Court. (Appendix 60a-62a). The defendant filed a timely notice of appeal from this judgment. The decision of the District Court is not yet reported.

STATUTES INVOLVED

The applicable statutory provisions arise under Connecticut law by virtue of Rules 64 and 65 of the Federal Rules of Civil Procedure. Copies of the applicable Connecticut statutes are reproduced in a supplement to this brief, at pages 37 through 43. (For convenience, the supplement will be referred to as Supp.). Chapter 904 of the Connecticut General Statutes (Sections 52-279 through 52-328) governs attachment orders. These sections define the rights or legal interests which may be attached, and the manner of attaching particular items of personal or real property. In particular, the attachment of shares of corporate stock or other corporate rights is governed by Section 52-289 of the Connecticut General Statutes. (Supp. p. 41).

Although the nature of the interest which may be attached is governed by the statutes set forth above, the procedure required to obtain the attachment order is found in Chapter 903a of the Connecticut General Statutes. (Sections 52-278a through 52-278m, Supp. pp. 37-40). Under the procedural sections, orders in the nature of attachment or garnishment are referred to as prejudgment remedies.

Finally, in seeking the prejudgment remedy order, the plaintiff relied upon a section of the Uniform Commercial Code dealing with investment securities, Section 42a-8-317 of the Connecticut General Statutes. (Supp. p. 42). This statute, and the other applicable statutes, will be discussed in some detail in the argument section of this brief.

ISSUE PRESENTED

Did the Court err in issuing a mandatory injunction directing the defendant to deposit securities located outside of the United States and outside of Connecticut in the District Court for the District of Connecticut for the sole purpose of permitting the plaintiff to perfect an attachment?

STATEMENT OF FACTS

The plaintiff's complaint in this case is based upon an Indemnity and Guaranty Agreement, dated February 11, 1976, (App. 16a), between the plaintiff, the defendant, and a corporation known as Coronado Group Limited, which is not a party to this action. On or about November 28, 1975, Coronado Group Limited (hereinafter referred to as "Coronado") borrowed the sum of \$250,000 from Banque Scandinave

en Suisse pursuant to a loan agreement. (App. 11a). At all times relevant to the issues in this litigation, the plaintiff and the defendant were stockholders of Coronado. The loan to Coronado from Banque Scandinave en Suisse was secured by an irrevocable Letter of Credit issued by the First National Bank of St. Paul. (App. 13a). Subsequently, the Indemnity and Guaranty Agreement, dated February 11, 1976, was executed by the parties in order to further secure the loan.

The complaint alleges that in July, 1976, the First National Bank of St. Paul paid the sum of \$250,000 to Banque Scandinave pursuant to the Letter of Credit, and that the plaintiff in turn paid the First National Bank of St. Paul. Suit was thereafter commenced against the defendant alleging a breach of the terms of the Indemnity and Guaranty Agreement.

Since this appeal arises from the granting of a mandatory injunction in aid of a prejudgment remedy application, there has not yet been a full development of the issues in the case below, and there has not been a full trial on the merits. However, a basic review of the legal positions of the parties would be appropriate.

As indicated above, both the plaintiff and the defendant were stockholders of Coronado, and each owned approximately 28 percent of the corporate shares. The defendant was an officer and a director of Coronado, and the plaintiff placed its representatives on the Coronado Board of Directors, including Mr. Robert Fischer, its President and Chief Executive Officer. The loan by Banque Scandinave was for the corporate purposes of Coronado, and the purpose of both the Letter of Credit and the Indemnity and Guaranty Agreement was to secure the loan. Under the terms of the latter agreement, the plaintiff was to provide "financial accommodations" up to the amount of

\$250,000 prior to the close of business on December 31, 1976. At the deposition of Mr. Fischer, it was conceded that no financial accommodations were provided by the plaintiff. In addition, even though an extension of the loan agreement was granted by Banque Scandinave, and the loan could have been extended upon payment of interest in the amount of approximately \$8,000 to \$9,000, the plaintiff elected not to advance the funds in order to prevent the default by Coronado.

As a result, the defendant has asserted a breach of the Indemnity and Guaranty Agreement, and a failure of its consideration, thereby rendering it void and unenforceable. (See Affirmative Defenses and Counterclaim, App. 48a - 53a). Secondly, the defendant has asserted that this action was premature in that the loan agreement could have been extended if the plaintiff had fulfilled its obligations.

In addition to the above, the defendant, in his counterclaim (App. 49a - 53a), has alleged that various representatives of the plaintiff on the Coronado Board of Directors caused it to be in default on the loan agreement for reasons related to the corporate purposes of the plaintiff, in breach of the director's fiduciary duty to Coronado.¹ Finally, the counterclaim alleges various other activities by the plaintiff's directors, which ultimately led to a petition for liquidation of Coronado in Bermuda.

As a result of this cursory examination of the factual questions, it is clear that there are substantive questions in dispute between the parties, and complex factual and legal issues to be litigated after both sides have had an opportunity for full disclosure and

¹ Although the plaintiff has moved to dismiss the First Count of the counterclaim, it has conceded that one count is properly before the Court. Judge Zampano has not yet ruled on the motion to dismiss.

preparation for trial.

The nature of the defendant's affirmative defenses and counterclaim was outlined for the Court in defense to the application for the prejudgment remedy. However, a review of the Court's memorandum of decision (App. 54a) demonstrates that the Court did not consider the assertion of such defenses and the counterclaim sufficient to deny the plaintiff a prejudgment remedy. The Court noted:

In the present case, however, while the defenses may be established at trial, they do not appear on the present record to be so certain as to bar the plaintiff from obtaining security while the issues are litigated. (App. 57a).

The Court concluded:

Although the defendant might prefer that the court treat the plaintiff's claims and the defendant's counterclaims as cancelling each other out at the prejudgment stage, it seems preferable to grant plaintiff its remedy once it establishes probable cause on its own claim and allow defendant to proceed independently for his own prejudgment remedy if he can make a similar showing. (App. 57a).²

For the purposes of this appeal, the important question does not involve the finding of probable cause by the District Court,³ but the application of the prejudgment remedy statute and the scope of the prejudgment remedy order. After making certain findings of fact,

² A prejudgment remedy on the counterclaim would be meaningless since the plaintiff apparently does not have any assets in Connecticut. Thus, the defendant would have to rely on the same interpretation of the same statute which he is attacking on this appeal in order to obtain an order directing the plaintiff to bring securities into this State.

³ The defendant, of course, does not concede that probable cause exists. However, the important question on appeal is one of law.

including a finding that the defendant's securities are located outside of the State of Connecticut and substantially all of them outside of the United States (Finding 10, App. 61a), Judge Newman concluded that there was probable cause for the plaintiff's claim against the defendant, and that an injunction should issue in aid of an attachment. (Finding 11, App. 61a). The Court issued an order "pursuant to applicable Connecticut law and Rules 64 and 65 of the Federal Rules of Civil Procedure" (App. 62a), as follows:

ORDERED, that defendant shall surrender to the Deputy Clerk of this Court in Bridgeport for attachment by the United States Marshall certificates evidencing publicly traded, marketable securities owned by him with an aggregate market value of \$312,500, provided that if the defendant does not own publicly traded, marketable securities with an aggregate market value of not less than \$312,500, he shall surrender to said Deputy Clerk all his publicly traded, marketable securities plus privately traded securities with an aggregate market value of not less than \$500,000 minus 160% of the value of publicly traded securities surrendered; all such securities shall be endorsed in blank, to be attached in accordance with the attachment process authorized herein, . . . (App. 62a).

Thereafter, the Court issued the mandatory injunction, from which the defendant filed a timely notice of appeal, seeking a review of the order, and in particular that portion of the order which directs the defendant to bring securities from outside of the United States and outside of the State of Connecticut into this jurisdiction for the sole purpose of attachment.

ARGUMENT

The order of the District Court which is the subject of this appeal is governed strictly by Connecticut law. Although the mandatory

injunction directing the defendant to bring securities into Connecticut for the purpose of attachment was issued pursuant to Rules 64 and 65 of the Federal Rules of Civil Procedure, the ultimate authority for the District Court to issue such an order must be found in Connecticut law if it exists. Huron Holding Corporation v. Lincoln Mine Operating Company, 312 U.S. 103, 61 S.Ct. 513, 85 L.Ed. 1143, Reh.Den. 313 U.S. 598, 61 S.Ct. 840, 85 L.Ed. 150; Chambers v. Blickle Ford Sales, Inc., 313 F.2d 252 (2d Cir 1963); Kend v. Chroma-Glo, Inc., 51 FRD 547 (D Minn 1970). Thus, we must look initially to Connecticut law to determine whether there is any authority for the issuance of the order of the District Court. Secondly, the order of the District Court must be reviewed in light of constitutional mandates with regard to procedural due process. It is respectfully submitted that the District Court order is not authorized by Connecticut law, and does not meet the requirements of procedural due process.

A. CONNECTICUT ATTACHMENT LAW DOES NOT AUTHORIZE THE DISTRICT COURT ORDER.

Under the common law of Connecticut, an order of attachment is not a right, but rather is strictly governed by statute. Clime v. Gregor, 145 Conn 74, 75, 138 A.2d 794 (1958). There is a long history behind the present attachment statutes in existence in the State of Connecticut. Aside from the procedural aspects of obtaining an attachment order in Connecticut, which will be discussed below, there is a specific statutory provision dealing with the attachment of corporate rights or shares. At common law, stocks of a domestic or foreign corporation were not subject to attachment. (7 CJS, "Attachment", Section 59, pages 253-254).

Under Section 52-289 of the Connecticut General Statutes, there are three essential steps for a valid attachment of the stock or rights in a corporation: (1) service must be made on the defendant personally or at his usual place of abode; (2) service must be made on the corporation; and (3) the shares of stock must be seized by the officer making the levy. (Supp. p. 41). The statute requires that the attachment be served upon the corporation by service "with the secretary, clerk or cashier of such corporation, or if he is absent from the state, then at the principal place in the state at which the corporation transacts its business or exercises its corporate powers". The net effect of this requirement is to limit orders of attachment of corporate rights or shares of stock in Connecticut corporations. This is the settled law of the State of Connecticut. Winslow v. Fletcher, 53 Conn 390, 4 Atl. 250 (1885); Barber v. Morgan, 84 Conn 618, 81 Atl. 791 (1911).

In Winslow v. Fletcher, supra, the defendant, who resided in the State of Indiana and owned stock in an Indiana bank, deposited a stock certificate with a blanket power to sell and transfer with an insurance company in Connecticut. The Court held that even though the stock was physically located in the State of Connecticut, and subject to seizure here, it could not be attached. The Court pointed out that, while the certificates are evidence of ownership, and for some purposes may be regarded as property, they are distinct from the stockholder's interest in the capital of the corporation, and therefore are not "goods and effects within the meaning of the statute relating to foreign attachment". (Supra at 396). In conclusion, the Court stated the following:

Thus, the question before us in one aspect of it, resolves itself into the question of the construction of our statute. Obviously, the statute can have no operation outside the limits of the state. When it speaks of "rights or shares in the stock of any corporation", it has exclusive reference to corporations existing under our laws, and it cannot affect rights in corporations existing under the laws of other states. Therefore the statute referred to does not authorize the attachment of the defendant's interest in the stock in question.

It is further contended that this interest may be attached under the general statute relating to attachments, it being the policy of our law to subject all a man's estate not specifically exempt to the payment of his debts. But that statute relates to ordinary process and not to the process of foreign attachment; it is limited and must be limited, to property in this state; it has and can have no extra-territorial operation. (53 Conn at 400).

In other words, for purposes of attachment, shares of stock have their situs at the location of the corporation. Barber v. Morgan, supra. Section 52-289 of the Connecticut General Statutes continues in full force and effect. The general law of the State concerning attachment of corporate rights or shares and this statute has remained unchanged for a number of years, except in one important respect. It is interesting to note that by virtue of 1959 Public Act 574, Section 5, effective October 1, 1961, the Legislature deleted the words "or its transfer by the holder enjoined" from the end of the section. (Supp. p. 41).⁴ During the same session of the Legislature, the Uniform Commercial Code was adopted as 1959 Public Act 133, effective October 1, 1961. Consequently, any applicable provisions of the Uniform Commercial

4 This was one of several amendments made to conform existing statutes with the Uniform Commercial Code.

Code, including Section 42a-8-317 of the Connecticut General Statutes, must be read consistently with Section 52-289.

In addition, although some states have enacted legislation authorizing attachment of a defendant's shares of stock in any corporation, including a foreign corporation, Connecticut has not adopted such legislation. (7 CJS, supra, Section 79, notes 26 and 28). However, regardless of the law in other states, it is clear that any attachment order to be valid must follow the mandatory requirements of Connecticut law.

Prior to the adoption of the Uniform Commercial Code, Connecticut adopted the Uniform Stock Transfer Act. The former Section 33-87 of the Connecticut General Statutes, being the Connecticut equivalent of the Uniform Stock Transfer Act, added a requirement to Section 52-289 of the Connecticut General Statutes, which provided that an attachment or levy upon shares of stock was ineffective "until such certificate is actually seized by the officer making the attachment or levy, or is surrendered to the corporation which issued it, or its transfer by the holder enjoined".⁵ However, it is clear that even under this provision, while a transfer by the holder might be enjoined, it clearly applied only to stock in Connecticut corporations, and the three step procedure outlined above was required. While under the former statutory provision, an order enjoining transfer pending perfection of the attachment might have been issued, there was no such authority for an injunction order directing surrender of the securities for the purpose of attachment. Consequently, unless there has been a change in pre-existing Connecticut law brought about by the adoption of

5 Section 33-87 was repealed by the adoption of the Uniform Commercial Code (1959 Public Act 133), which replaced the entire Uniform Stock Transfer Act.

the Uniform Commercial Code, it is clear that Connecticut law does not now, and never has, authorized a mandatory injunction as issued by the District Court.

In view of the above, we must examine the statutory change brought about by the adoption of Section 42a-8-317 of the Connecticut General Statutes, which forms a portion of the Uniform Commercial Code dealing with investment securities.⁶ Both the plaintiff and the District Court relied upon that section of the statute, in part, to justify the mandatory injunction order. However, it is respectfully submitted that the adoption of the Uniform Commercial Code did not change the existing law in the State of Connecticut, and that this section cannot be interpreted as repealing in any way Section 52-289 or the decisions of the courts of this State interpreting the Connecticut attachment law. In other words, Section 42a-8-317 of the Connecticut General Statutes must be read in a manner which is consistent with the other statutory provisions dealing with attachment of corporate rights or shares. As a matter of fact, the language of Section 42a-8-317 specifically states that the security must be seized, or surrendered to the issuer at its source, and if other orders of the court are issued as an aid to reach the security in question, it can only be done "as is allowed at law or in equity". (Emphasis added). Thus, the section does not expand the existing law, but merely refers to it and incorporates it by reference. As noted, the language of 42a-8-317(2) is exactly the same as the former Section 33-88. This writer did not find any decision of any court interpreting the Uniform Stock Transfer Act to permit the application of the order issued by the District Court. Professor Edward L. Stephenson,

6 Section 42a-8-317 has two paragraphs. The first parallels the former Section 33-87, but makes language changes not relevant herein. However, the second paragraph has the exact same language as the former Section 33-88.

a leading authority on Connecticut civil procedure, stated, in discussing Section 8-317 of the Uniform Commercial Code:

No matter which method of service is used, the attachment is ineffective until the certificate is actually seized by the officer unless it has been previously surrendered to the corporation. The serving officer must not only serve the corporation; he must also take physical possession of the stock certificate. The commercial code provides that the attaching creditor is entitled to such aid as the state otherwise provides in obtaining possession of the certificate. This provision does not authorize such aid but merely confirms existing state practice, if any, which makes it available. (Stephenson, Connecticut Civil Procedure, Section 66c at 269-270).

Unless there is some other statutory provision authorizing the procedure sought by the plaintiff, the defendant may not be ordered to bring his securities into the State for attachment purposes, nor may an order of attachment be issued as to any of his securities, since the securities are not in this State, and none represent an interest in a Connecticut corporation. (See also, Stephenson, op. cit., supra at 269).

In issuing the mandatory injunction order, Judge Newman relied upon the case of Fleming v. Grey Manufacturing Co., 352 F.Supp., 724 (D Conn 1973). (See App. 58a - 59a). It is respectfully submitted that this case does not authorize the type and nature of injunction order issued by Judge Newman in this case, and, insofar as it may imply that such relief may be granted under Section 42a-8-317 of the Connecticut General Statutes, it is contrary to Connecticut law and should be overruled. The case was a breach of contract action in which the plaintiff sought to attach stock owned by the defendant in subsidiary and affiliated corporations. The contract in question dealt with an agreement for

the sale of stock of a New York corporation, which stock was owned by various interrelated corporations, including two Connecticut corporations which were the main defendants. Since the contract for the sale of the stock was the subject of the dispute, we have a distinctly different question than the one presented in this case, where title to the stock is not in dispute. Secondly, the relief granted by the Court was substantially narrower than that requested by the plaintiff, and the Court did not go so far as to order that the stock be brought into the State of Connecticut for the purpose of attachment. Rather, the Court merely granted injunctive relief with regard to the transfer of the stock. The Court, in that decision, relied solely on Section 42a-8-317 of the Connecticut General Statutes as granting authorization for the injunction order. It is respectfully submitted that insofar as the holding of the Court in that case appears to be contrary to the rule set forth in Winslow v. Fletcher, supra, a careful examination of the case shows that the subject matter is actually different. Secondly, the Uniform Commercial Code does not authorize the type of relief granted in the instant action, even though it may purport to grant the relief sought in Fleming.

It is important to keep in mind that Section 42a-8-317 is part of the portion of the Uniform Commercial Code dealing with investment securities. The purpose of Article 8 of the Uniform Commercial Code is not related to attachment or garnishment, but rather deals with the sale and transfer of securities. "It has been called a negotiable instruments law of investments securities." (Official commentary to Uniform Commercial Code, Section 42a, Article 8, Connecticut General Statutes at 253). It is primarily intended to deal with the rights

of various parties involved in the sale and transfer of corporate securities, including shares of stock. Although the only Connecticut Supreme Court decision dealing with Article 8 of the Uniform Commercial Code is not applicable to the facts of this case, it is clear that the article applies only to transfer of securities, and deals with the rights and liabilities of the parties to the transaction involving the sale or transfer of securities. Burns v. Gould, (38 Conn L.J., No. 28, Page 4, January 11, 1977). The article is not primarily intended to deal with the question of attachment. If Section 8-317 deals with the question of attachment in any way, it is only in an incidental and insignificant manner, and it cannot be interpreted so as to overrule the existing law of the State. While there may be some instances where, as a result of the transfer or sale of a security, certain extra-territorial effect may be given between the parties to the transaction, and certain injunction orders may be issued by the court with regard to a security which is the subject of the dispute, it is clear that Section 42a-8-317 does not apply to the attachment of shares of corporate stock which are not involved in the underlying transaction.

The Court below, and the plaintiff in its brief, relied upon the official commentary to Section 8-317, which cites the case of Hodes v. Hodes, 176 Ore 102, 155 P.2d 656 (1945). The official commentary points out that the security "itself must be reached to constitute a proper levy". It should be further noted that Hodes v. Hodes, supra, does not approve the method used in this case, nor is it in any way applicable to the type and nature of the order issued by the District Court. In that case, which initially started as a divorce action, there was a final judgment granting the wife separate mainten-

ance and support under Oregon law, which order the husband failed to comply with. After an examination of the husband as a judgment debtor, he was directed to bring shares of stock in an Oregon corporation into Oregon for the purpose of levy of execution. Thus, two of the three steps mentioned earlier for a valid attachment in Connecticut were already present in Oregon. There was personal service on the husband, and the stock was in an Oregon corporation and the papers had been served on the corporation. Only the third step requiring seizure remained. Such is not the case in the instant action because the stock is not in any Connecticut corporation and is not physically located here.

It is also interesting to note that Hodes v. Hodes has not been applied in any other reported decision of the Oregon Supreme Court, nor has it been applied in the manner suggested by either the commentary or the District Court in any other reported decision. A review of the cases which cite Hodes v. Hodes demonstrates that the case has never been applied for the purpose of enforcing a similar attachment order. In Navael Investment Co. v. Schrunk, 279 P.2d 518 (Ore 1955), there was a question involving the validity of an assignment, and it did not involve a question of garnishment or attachment. In Glenn v. Farrell, 5 Utah 2d 439, 304 P.2d 370 (1956), the Court held that in order to have a valid attachment it was necessary to both seize the certificate and to serve the writ on the corporation. In that case, the certificate had been seized, but there was no service on the corporation, and the Court held that the attachment was invalid for that reason. In Westerman v. Gilbert, 119 F.Supp., 355 (D RI 1953), stock in a Rhode Island corporation was owned by a resident of New York, held by him in New York, and was therefore not subject to attachment. The Court held

that the situs of the stock is where the certificate is located. Finally, in Frost v. Davis, 288 F.2d 497 (5th Cir 1961), the Court held that the stock must be physically seized in order to have a valid attachment, and went on to state:

The requirement that the officer actually seize the certificate is something more than a procedural provision; it is a positive statutory provision against the attachment, levy or garnishment unless there is compliance with the act. (at 499).

Thus, in all of the situations in which Hodes v. Hodes was cited, the court did not apply the case in the manner or for the purpose suggested by the District Court order or by the plaintiff in its brief below. Moreover, an examination of these cases shows that they are in accord with the Connecticut law as outlined above, since they require both seizure of the certificate and service upon the corporation.

Aside from this, and perhaps more important, there is only one case which is directly on point in dealing with the application of Section 8-317 of the Uniform Commercial Code in a similar situation. The question was squarely presented to the District Court in Nederlandsche Handel-Maat-Schappij, N.V. v. Sentry Corporation, 164 F.Supp. 800 (ED Pa 1958). In that case, the plaintiff asked the Court to compel the defendant to bring shares of stock from other states into the district and place them in the hands of a United States Marshall for attachment under Pennsylvania law. The Court held that such an order was not authorized by existing Pennsylvania law, nor was it authorized by Section 8-317 of the Uniform Commercial Code:

The defendant asserts that the securities cannot be attached because they are without the geographical limits of this court and therefore beyond the jurisdiction and not subject to our decrees. With this we agree. It is well established that the basis for a writ of foreign attachment is the presence of property within the jurisdiction of the court. (Citations omitted).

Since there appears to be no controversy over the allegation that the securities in question are in a place other than Pennsylvania, it is clear that this court lacks jurisdiction over them, and plaintiff's motion for a preliminary injunction must fail. (Supra at 803).

The only other reported decisions interpreting Section 8-317 of the Uniform Commercial Code are not in any way contrary to the holding of the District Court in Pennsylvania. Knapp v. McFarland, 462 F.2d 935 (2d Cir 1972) dealt with a sheriff's right to "poundage" in a case involving the effectiveness of a levy of execution on a stock certificate in the hands of a bank acting as custodian. Secondly, Neifeld v. Steinberg, 438 F.2d 423 (3rd Cir 1971) is in accord with the decision quoted above, even though decided on other grounds. In the course of the opinion, it was noted that a writ of foreign attachment which commenced the suit, which was served on a stockbroker holding some of the defendant's securities, was invalid by reason of the sheriff's failure to seize such securities. The Court pointed out the importance of manual seizure of the securities in order to effect a valid attachment. (Supra at 432).

In light of the above, it is clear that Section 8-317 of the Uniform Commercial Code has never been applied by any court in the manner suggested by the order of the District Court, and that the District Court erred in issuing its injunction order.

The mandatory injunction order of the District Court is not authorized by any existing Connecticut statute, nor by the common law of the State. Under these circumstances, the mandatory injunction order should be reversed. There is no authority for an injunction order directing a defendant to bring into the jurisdiction shares of stock in corporations which are not Connecticut corporations, which are not related to any issue in controversy, and which have never been located in the State of Connecticut. Indeed, in this case, we not only have an attempt to apply a Connecticut statute in states other than Connecticut, we have an attempt to apply a Connecticut statute outside of the territory of the United States. While in some instances, the Congress of the United States may have authority to exercise jurisdictional power on an extra-territorial basis (e.g. Leasco Data Processing Equipment Corp. v. Maxwell, 486 F.2d 1326 (2d Cir 1972)), this is a power which has been narrowly applied and has never been applied in situations such as the instant one. (See: Airline Stewards and Stewardesses Association v. TWA, 273 F.2d 69 (2d Cir 1959), cert den, 362 U.S. 988 (1960), 80 S.Ct. 1075, 4 L.Ed.2d 1031.

Thus, in view of the above, there is no basis in law for an attachment order of the type or nature issued by the District Court in this case.

Similarly, it is respectfully submitted that such relief cannot be granted with regard to other types of investment securities. If the documents evidencing the securities are not in the State of Connecticut, then any garnishment or attachment cannot be effective until actual seizure of the securities. As stated by Professor Stephenson:

Any bond is a promise to pay money and the issuer thereof is a "debtor" of the holder and therefore subject to ordinary garnishment process. The commercial code, however, expressly provides that, in the case of any bond which meets the definition of "investment security", the garnishment is ineffective until the document itself is seized. Thus, the officer serving process must serve garnishment process on the obligor and also attach (i.e. take possession of) the document. The problem of obtaining possession of the document has already been considered in connection with stock certificates. (Stephenson, op. cit., supra; see also Section 52-329 of the Connecticut General Statutes).

Thus, bonds or other securities would fall within the same category as shares of stock, insofar as the requirement of seizure of the property. Once again, there is no authority for an order requiring that property be transferred into the State of Connecticut for the purpose of attachment.

B. THE ORDER OF THE DISTRICT COURT IS A DENIAL OF PROCEDURAL DUE PROCESS.

Although the nature and scope of an attachment order in Connecticut is governed by the statutes set forth above, the procedure to be followed was established by the Connecticut Legislature in 1973. (Connecticut General Statutes, Section 52-278a - 52-278m; Supp. pp. 37-40). This statute was adopted in response to the decisions of the United States Supreme Court in Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed. 556 (1972); Sniadach v. Family Finance Corporation, 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969); and the decision of the United States District Court for the District of Connecticut following remand from the United States Supreme Court in Lynch v. Household Finance Corporation, 405 U.S. 538, 31 L.Ed.2d 424,

92 S.Ct. 111 (1972). The District Court (360 F.Supp. 720 (1973)) found the Connecticut statute to be an unconstitutional violation of the due process clause of the Fourteenth Amendment to the United States Constitution. Thereafter, the statute dealing with prejudgment remedies upon which the plaintiff relies in this case was adopted by the Connecticut Legislature.

A brief review of the recent decisions of the United States Supreme Court concerning prejudgment remedies and similar relief is helpful. In Sniadach v. Family Finance Corporation, supra, the Court declared a Wisconsin statute that permitted wage garnishments without notice or hearing and prior to judgment to be unconstitutional. The decision of the Court rested upon two principles. The first was that the garnishment of wages, even if only temporary, and even if the debtor eventually prevails, constitutes a taking of property within the meaning of the Fourteenth Amendment to the United States Constitution. Secondly, in the absence of special circumstances, there can be no taking without prior notice and a prior hearing. A similar result was reached with regard to state replevin statutes in Fuentes v. Shevin, supra. Although the Court, in Mitchell v. W. T. Grant Co., 416 U.S. 600, 94 S.Ct. 1995, 40 L.Ed.2d 406 (1974) permitted an ex parte seizure of property under the Louisiana statute, some doubt on the extent of that decision was caused by the later decision of the Court in North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 95 S.Ct. 719, 42 L.Ed.2d 751 (1975). In that case, a corporation against which suit had been brought in the Georgia State Court challenged the validity of Georgia statutes under which the plaintiff corporation garnished the defendant's bank accounts. It is clear from

the Court's opinion that the general principles announced in Sniadach v. Family Finance Corporation, supra, and Fuentes v. Shevin, supra, remain viable and applicable to all state prejudgment remedy statutes. In essence, then, the due process clause of the Fourteenth Amendment requires that there be a hearing at a meaningful time and an effective opportunity to be heard prior to the taking of property by way of attachment or some other similar process. Otherwise, the accepted standards of procedural due process as required under the Fourteenth Amendment are not met. As summarized by the Court in Fuentes v. Shevin, supra:

The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decision making when it acts to deprive a person of his possessions. The purpose of this requirement is not only to insure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment - to minimize substantively unfair or mistaken deprivations of property, a danger that is especially great when the state seizes goods simply upon the application of and for the benefit of a private party. So viewed, the prohibition against the deprivation of property without due process of law reflects the high value, imbedded in our constitutional and political history, that we place on a person's right to enjoy what is his, free of governmental interference. (32 L.Ed.2d at 570).

The Court went on to state:

If the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented. At a later hearing, an individual's possessions can be returned to

him if they were unfairly or mistakenly taken in the first place. Damages may even be awarded to him for the wrongful deprivation. But no later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred. (32 L.Ed.2d at 570-571).

In this case it is not necessary to reach the question of whether the Connecticut statute in general meets the constitutional standard. Rather, this case can be decided on a much narrower issue. The application of the statute to the facts and circumstances of this case constitutes a denial of procedural due process. Even though a statute may be valid in its scope, if it is applied in an unconstitutional manner, then the action of the court can be invalidated under the due process clause.

If we assume for the purposes of argument that the District Court had authority to issue the mandatory injunction order, it is respectfully submitted that the order is in itself a denial of procedural due process. As the record will show, the defendant has raised substantial defenses both to the complaint in general and to the application for a prejudgment remedy. However, as pointed out earlier, the District Court ignored those defenses in reaching its decision. Under the Connecticut statute, there must be a finding of "probable cause". (Section 52-278(a) of the Connecticut General Statutes). Relying on Long v. Abbott Mortgage Company (Civil No. N-74-133, D Conn 1975), the District Court held that the requirement of probable cause is no higher than the "reasonable grounds to believe" standard of probable cause in the context of criminal law (App. 56a).

The standard of probable cause in a civil case places a burden on the plaintiff to demonstrate by clear and concrete evidence

that there is validity to its claim, and that it is more likely than not that a judgment will be rendered in favor of the plaintiff after a full trial. Moreover, in a case where there is a likelihood of set-off or counterclaim, the court must further conclude that said counterclaim or set-off would be legally insufficient to defeat the plaintiff's claim. In view of the nature of the defenses raised by the defendant, the magnitude of the dollar amounts involved, and the complicated legal and factual questions involved, it is respectfully submitted that the type and nature of the hearing on a prejudgment remedy application is inadequate as a matter of law. This is a case where the essential witnesses are not available to subpoena within the District of Connecticut. The corporate records are located with the liquidator of the corporation in Bermuda. There are substantial defenses to the claim, including a failure of consideration for the Indemnity and Guaranty Agreement based upon misconduct by officers and employees of the plaintiff, and counterclaims based upon affirmative misconduct in breach of fiduciary duty. To require a defendant to fully prove his defenses at a preliminary stage in the proceedings within a short time after the initiation of the suit and prior to the use of discovery and other techniques to fully develop the issues in the case, is in itself unreasonable and a denial of procedural due process. The effect of the attachment order is to effectively and finally deprive the defendant of the use and enjoyment of his property, without a meaningful hearing. Sniadach v. Family Finance Corporation, supra. The standard of probable cause must take into account the

nature of the loss, the magnitude of the effect of an attachment order on the defendant, and the adequacy of the hearing which can be given.⁷

The above is especially true when the defendant has been ordered to bring into the jurisdiction securities which have never been within the jurisdiction. It is clear that the securities are outside of the territorial jurisdiction of the Court and beyond the borders of the United States. There is no claim or allegation that the defendant has attempted to avoid his legal obligation, if any, in this case, by transferring property outside of the jurisdiction. The securities are not now, and have never been, within this jurisdiction. Thus, fundamental principles of fairness and essential due process require that the defendant not be required to comply with the court order. While it may be argued that a man should be responsible for his debts and obligations, it does not follow from this principle that he be required at a prejudgment stage to bring in his assets from wherever they may be located to a particular jurisdiction for the mere convenience of the plaintiff in a law suit.

The net effect of the court order is to place the defendant in a worse position than if judgment had been rendered against him after a full and fair trial on the merits. Pursuant to Section 52-367 of the Connecticut General Statutes (Supp. p. 43), the procedure for a levy of execution on corporate stock is substantially similar to that

7 The Vermont statute permitting a non-possessory prejudgment attachment of personalty was recently held invalid even though there is provision for a prompt post attachment hearing. Briere v. Agway, Inc., (D Vt, Civil No. 76-41, 1977). The Vermont statute permitting non-possessory prejudgment attachment of real estate had been previously invalidated. Terranova v. AVCO Financial Services, Inc., 396 F.Supp. 1402 (D Vt 1975).

set forth in Section 52-289 for the attachment of stock. It is required that the officer serve the writ of execution on the "secretary, clerk or cashier of the corporation. As noted by Professor Stephenson, op. cit., supra, Section 251:

These provisions, like the parallel provisions relating to attachment of corporate stock, apply only to stock of domestic corporations. There is no way of attaching or levying execution on stock of foreign corporations, even though the stock certificates are in this state.

Moreover, at the time of the adoption of the Uniform Stock Transfer Act, it was specified that the levy of execution would be invalid until any outstanding stock certificate is actually seized by the officer making the levy of execution, or surrendered to the corporation which issued it. (Now Section 52-267 of the Connecticut General Statutes). By the adoption of the Uniform Commercial Code, reference to the injunction provision was deleted from this section also.⁸ Consequently, the levy is not valid until the share certificate has been seized by the officer or surrendered to the corporation. See Winslow v. Fletcher, supra. Under these circumstances, the attachment order of the District Court places the defendant in a substantially worse position than he would have been in if judgment had been rendered against him after a trial on the merits.

For these reasons, the net effect of the District Court order, including its scope and nature, is a denial of procedural due process and should be invalidated.

8 This was one of the conforming amendments adopted by 1959 Public Act 574, Section 6.

C. THE DISTRICT COURT ORDER IS APPEALABLE.

At the time of filing a brief on the defendant's motion for a stay of the District Court's order in this Court, and the argument thereon before this Court, a question was raised concerning the appealability of the District Court order. Consequently, although not directly related to the issue on appeal, the defendant believes that it is appropriate to discuss this issue.

This case presents an interlocutory appeal within the scope of 28 U.S.C. 1292(a)(1) in that it is an appeal from the granting of a mandatory injunction. That section specifically deals with interlocutory orders of the District Court with regard to injunctions. This Court has held that the section is limited "to injunctions which give or aid in giving some or all of the substantive relief sought by a complaint . . .". International Products Corp. v. Koons, 325 F.2d 403, 406 (2d Cir 1963). However, in the same case, this Court pointed out that it does not include "restraints or directions in orders concerning the conduct of the parties or their counsels, unrelated to the substantive issues in the action while awaiting trial." (Supra at 406; see also Miller v. United States, 403 F.2d 77 (2d Cir 1968)). It is apparent that the granting of security in advance of a judgment is in legal effect granting a portion of the substantive relief sought by the complaint. In the absence of a finding of probable cause for the validity of a complaint, there is no basis for the issuance of an attachment order, or a mandatory injunction in aid of an attachment. Thus, the nature of the order is to grant some of the substantive relief sought by the plaintiff. Consequently, we would urge that this appeal falls within the general grounds permitting the appeal from the granting of a temporary injunction. See e.g. Semmes Motors, Inc. v. Ford

Motor Company, 429 F.2d 1197 (2d Cir 1970).

However, the question is not answered quite so easily because of the general authority in this Circuit concerning the appealability of attachment orders. While it is the defendant's position that this order is an injunction in legal effect, and not merely an attachment order, it would be helpful to review the decisions of this Court. The prior decisions are factually distinguishable from the instant situation. Financial Services, Inc., v. Ferrandino, 474 F.2d 743 (2d Cir 1973) was an action for a preliminary injunction to require the release of an ex parte order of attachment. Thus, it was not an appeal from an attachment order, but from the denial of a preliminary injunction. West v. Zurhorst, 435 F.2d 919 (2d Cir 1970) was an appeal from an order refusing to vacate an attachment. W. T. Grant Co. v. Haines, 531 F.2d 671 (2d Cir 1976) was an appeal from an order continuing in effect an order of attachment. In addition, the original appeal filed in part in Rosenfeldt v. Comprehensive Account. Serv. Corp., 514 F.2d 607 (7th Cir 1975) was not an attachment order, but rather was a different type of order requiring that a party cease collecting certain fees or performing certain services.

The order of the District Court in this case is not merely an order authorizing attachment or seizure of assets located in the State of Connecticut. It is a mandatory injunction directing the defendant to bring in securities from outside of the jurisdiction. Thus, it is much more than an attachment. Moreover, we have one of those unusual circumstances which has compelled this Court in other situations to consider an appeal in its merits. For example, an order denying the right to garnish the United States, based upon sovereign immunity, has been held appealable. Chilean Line, Inc. v. United States, 344 F.2d 757 (2d Cir 1965).

Aside from such exceptional cases, this case falls squarely within the test set forth in Cohen v. Beneficial Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949). As analyzed by Moore, Federal Practice, Paragraph 110.13(5), the Cohen case found the order appealable on the basis of the following test:

1. It presented a serious and unsettled question of law;
2. It could not be reviewed effectively on appeal from the final judgment; and
3. The claim to the right of the prejudgment order is separable from the cause of action.

All three reasons are applicable to this case.

As noted by the Court in Cohen, supra:

This decision appears to fall in that small class which finally determines claims of rights separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated. The court has long given this provision of the statute this practical rather than a technical construction. (Citations omitted).

We hold this order appealable because it is a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it. But we do not mean that every order fixing security is subject to appeal. Here it is the right to security that presents a serious and unsettled question. If the right were admitted or clear and the order involved only an exercise in discretion as to the amount of security, a matter the statute makes subject to reconsideration from time to time, appealability would present a different question. (337 U.S. at 546-547).

For similar reasons, the Supreme Court held the Cohen rule applicable to an order vacating an attachment, where the right to the attachment presented a serious and unsettled question of law. Swift & Co. Packers v. Compania Columbiana Del Caribe, 339 U.S. 684, 70 S.Ct. 861, 94 L.Ed. (1950). In addition to presenting a serious and unsettled question of law, this case falls squarely within the Cohen test and should be held appealable for that reason. It is the right to order that securities be brought into the jurisdiction which is at issue.

Although this Court has applied the Cohen rule narrowly, there are a number of instances in which the Court has found narrow exceptions to the general non-appealability of interlocutory orders. See, for example, Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 496 F.2d 800 (2d Cir 1974); and The NCK Organization Ltd. v. Bregman, 542 F.2d 128 (2d Cir 1976) where the Court reviewed on interlocutory appeals questions of orders concerning disqualification of counsel, and Eisen v. Carlisle and Jacqueline, 370 F.2d 119 (2d Cir 1966) concerning class action determinations. For these reasons, it is respectfully submitted that the appeal in this case falls within this "narrow exception". Furthermore, based upon the scope and nature of the order in this case, justice and equity require that the defendant have a full and fair opportunity to be heard on appeal.

There is, in addition to the above, one other reason why this order should be appealable. The only basis for federal jurisdiction in this case is diversity of citizenship. There is no reason why this case could not have been brought in the state courts in Connecticut. The only authority for granting an order of attachment, or a mandatory injunction in aid of an attachment order, under Rules 64 and 65 of the Federal Rules of Civil Procedure, is based upon state law. Huron

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May 26, 1977

Honorable Ellsworth A. Van Graafeland
Honorable Lawrence Pierce
Honorable William O. Mehrrens
United States Court of Appeals
Second Circuit
Foly Square, New York
New York

77-7026 B

Re: Docket #77-7026
Inter-Regional Financial Group, Inc.
v.
Hashemi

Dear Judges:

In reviewing my brief, I discovered a material error in the quotation from the deposition of the Connecticut Supreme Court in E. J. Hanson Elevator Co., Inc. v. Stoll, set forth on page 31. The last sentence of the quotation should read: "We conclude that the Order is a final judgment from which an appeal may be taken."

I would request permission to file a substitute page 31 reflecting the correction.

A copy of the substitute page is attached.

Very truly yours,

Frank W. Murphy

FWM:hs
Enclosure

Holding Corporation v. Lincoln Mine Operating Co., supra; Chambers v. Blickle Ford Sales, Inc., supra; Kend v. Chroma-Glo, Inc., supra. The only Connecticut authority for the prejudgment remedy and the procedure which was followed is found in Section 52-278a through Section 52-278m of the Connecticut General Statutes (Supp. pp. 37-40). By virtue of the Connecticut statutes, the granting of a prejudgment remedy "should be deemed as a final judgment for the purposes of appeal". (Connecticut General Statutes, Section 52-2781(a)). Even prior to the adoption of that statute by the Legislature, the Connecticut Supreme Court held in E. J. Hanson Elevator Co., Inc. v. Stoll, 167 Conn 623, 256 A.2d 893 (1975) that the granting of a prejudgment remedy order was a final judgment for the purposes of an appeal. As noted by the Connecticut Supreme Court:

The hearing on the application for the prejudgment remedy is a separate and distinct statutory judicial proceeding which is terminated by the order of the court rendered as a result of its determination of a narrowly restricted question, viz. 'whether or not there is probable cause to sustain the validity of the plaintiff's claim'. The decision of the court in that separate and distinct proceeding prescribed by Public Act 73-431 concludes the rights of the parties as to the available prejudgment remedy so that further proceedings in the determination of the merits of the action alleged in the plaintiff's complaint cannot affect. We conclude that the order is not a final judgment from which an appeal may be taken. (167 Conn at 629-631).

Thus, it is clear that if this action were pending in a state court, the order of the court below would be reviewable on appeal by the Connecticut Supreme Court. While it is recognized that a distinction is made between matters of substance and procedure, it is

clear that this amounts to a matter of substantive law. As pointed out by this Court in a case not material to the issues here, the source of the right claimed must be reviewed in a diversity case, rather than the ground of federal jurisdiction. Maternally Yours v. Your Maternity Shop, 234 F.2d 538 (2d Cir 1956).

The source of the legal authority for the issuance of the order in this case is the statutes of the State of Connecticut, and not federal law. By virtue of Erie Railroad v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), and the Rules of Decision Act, 28 U.S.C. 1652, a federal court must apply state law in deciding the merits of a diversity case. Similarly, under those authorities, we should look to Connecticut law on the question of appealability. In Guaranty Trust Company v. York, 325 U.S. 99, 65 S.Ct. 1464, 89 L.Ed. 2079 (1945), the Supreme Court announced the basic test for the application of the Erie Doctrine. As pointed out by the Court, the pertinent question is:

. . . does it significantly affect the result of a litigation for a federal court to disregard a law of a State that would be controlling in an action upon the same claim by the same parties in a State court?

* * *

. . . In essence, the intent of that decision was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as the legal rules determine the outcome of a litigation, as it would be if tried in a State court. The nub of the policy that underlies Erie R. Co. v. Tompkins is that for the same transaction the accident of a suit by a non-resident litigant in a

federal court instead of in a State court a block away, should not lead to a substantially different result . . . Erie R. Co. v. Tompkins has been applied with an eye alert to essentials in avoiding disregard of State law in diversity cases in the federal courts. A policy so important to our federalism must be kept from entanglements with analytical or terminological niceties. (326 U.S. at 109-110).

While later cases have modified a strict "outcome determinative" test, this is not a situation where the essential character or function of a federal court is affected by the state law. Byrd v. Blue Ridge Rural Electric Cooperative, Inc., 356 U.S. 525, 78 S.Ct. 893, 2 L.Ed.2d 953 (1958). The present test is now essentially set forth in Hanna v. Plumer, 380 U.S. 460, 85 S.Ct. 1136, 14 L.Ed.2d 8, 1965. This case distinguished between matters of substance and "house-keeping rules" such as service of process under Rule 4D1 of the Federal Rules of Civil Procedure. The Court concluded that the Erie Doctrine is based upon the proposition that it "would be unfair for the character or result of a litigation materially to differ because the suit had been brought in a federal court". (380 U.S. at 467). Thus, in applying the Erie Doctrine, the Court must consider the following:

The "outcome determination" test therefore cannot be read without reference to the twin aims of the Erie rule: discouragement of forum shopping and avoidance of inequitable administration of the law. (380 U.S. at 468).

As a result of a comprehensive review of the rules in diversity cases, the Sixth Circuit, in Miller v. Davis, 507 F.2d 308 (6th Cir 1974) concluded:

In light of the above analysis, we hold that the following test determines whether a federal court should apply a state rule when it is enforcing rights created by a state law:

1. If the state provision is the substantive right or obligation being asserted, the federal court must apply it.
2. If the state provision is a procedural rule which is intimately bound up with the substantive right or obligation being asserted, the federal court must apply it.
3. If the state provision is a procedural rule which is not intimately bound up with the substantive right or obligation being asserted, but its application might substantially change the outcome of the litigation, the federal court should determine whether state interests in favor of applying the state rule outweigh countervailing federal considerations against application of the rule. If the state interests predominate, the state rule should be adopted. (at 314).

In applying this test to the question of appealability of the order, it is clear that the substantive right which the plaintiff asserted in obtaining the prejudgment remedy order is a matter of state law, and that the procedures which follow therefrom, including the right to appeal, are intimately bound up with the substantive right or obligation.

The plaintiff elected the federal forum and the procedural aspects of review of a prejudgment remedy order should not differ because a federal court was selected rather than a state court.

In view of the above, it is respectfully submitted that the order should be deemed appealable for the following reasons:

1. A mandatory injunction was issued within the meaning of 28 U.S.C. 1292(a)(1);
2. The case falls within the exception stated in Cohen, supra. The right to this injunction order presents serious and unsettled questions of law which should be reviewed by this Court; and
3. By virtue of applicable Connecticut law, the granting of a prejudgment remedy order is a final order for the purposes of appeal, and thus is appealable under the Erie Doctrine.

For all of these reasons, the defendant should be granted an opportunity to be heard on appeal.

CONCLUSION

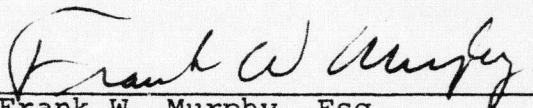
The District Court erred in its granting of a prejudgment remedy. The nature and scope of the order in this case is a denial of procedural due process and exceeds the authority of the Court. There is no basis under Connecticut law for the issuance of a mandatory injunction directing the defendant to bring securities from outside of the jurisdiction into Connecticut for the sole purpose of attachment.

It is well settled that, in order to have a valid attachment of securities, in addition to service on the owner, there must be service upon the corporation at its office in Connecticut, and seizure of the asset. Consequently, two of the three essential steps for a valid attachment are not present. The injunction order of the District Court is a radical departure from the settled law of this State and most jurisdictions. It not only orders attachment of assets not subject to seizure and not located here, but it gives extra-territorial effect to a state statute. It places the defendant in a worse position than he would be in if a final judgment had been rendered against him after a full trial on the merits.

For these reasons, the defendant requests that the mandatory injunction order issued by the District Court on December 28, 1976, be reversed.

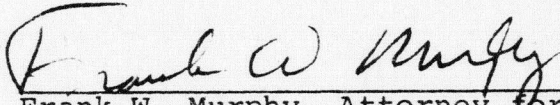
Respectfully submitted,

THE PLAINTIFF,

By: 
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His Attorney

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of this Brief and Appendix has been made on opposing Counsel by mailing four (4) copies to Paul E. Knag, Cummings & Lockwood, One Atlantic Street, Stamford, Connecticut, by depositing copies of the same in the United States Mail, postage prepaid as indicated above.


Frank W. Murphy, Attorney for
the Defendant - Appellant

SUPPLEMENT TO BRIEF

Excerpts from CHAPTER 903a

PREJUDGMENT REMEDIES

§ 52-278a. Definitions.

* * *

§ 52-278b. Prejudgment remedies, requirements; exception, waiver in commercial transaction.

Notwithstanding any provision of the general statutes to the contrary, no prejudgment remedy shall be available to a person in any action at law or equity unless he has complied with the provisions of sections 52-278a to 52-278g, inclusive, except an action upon a commercial transaction wherein the defendant has executed a waiver as provided in section 52-278f.

§ 52-278c. Documents required. Forms. Hearing. Temporary restraining order. Entry fee. Service on defendant.

A. Except as provided in sections 52-278e and 52-278f, any person desiring to secure a prejudgment remedy shall attach his proposed unsigned writ, summons and complaint to the following documents:

(a) An application, directed to the court to which such action is made returnable, for the prejudgment remedy requested;

(b) An affidavit sworn to by the plaintiff or some competent affiant setting forth a statement of facts sufficient to show that there is probable cause that judgment will be rendered in the matter in favor of the plaintiff;

(c) A form of order that a hearing be held before the court or a judge thereof to determine whether or not the prejudgment remedy requested should be granted and that notice of such hearing be given to the defendant;

(d) A form of summons directed to a proper officer commanding him to serve upon the defendant at least four days prior to the date of the hearing, pursuant to the law pertaining to the manner of service of civil process, the application, a true and attested copy of the writ, summons and complaint, such affidavit and the order and notice of hearing.

* * *

§ 52-278d. [Hearing on prejudgment remedy application. Determination by the court. Service of process. Stay]

(a) The defendant shall have the right to appear and be heard at the hearing. The hearing shall be limited to a determination of whether or not there is probable cause to sustain the validity of the plaintiff's claim. If the court, upon consideration of the facts before it, finds that the plaintiff has shown probable cause to sustain the validity of his claim, then the prejudgment remedy applied for shall be granted as requested or as modified by the court unless the prejudgment remedy or application for such prejudgment was dismissed or withdrawn pursuant to the provisions of section 1 to 3, inclusive, of public act 76-21.

* * *

§ 52-278e. Allowance of prejudgment remedy without hearing. Subsequent motion, hearing and order.

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§ 52-278f. Effect of waiver of notice and hearing in commercial transactions.

* * *

§ 52-278g. Motion to preserve existing prejudgment remedies.

* * *

[§ 52-278h. (P.A. 75-459, §2) Application of chapter, forms and procedures]

* * *

§ 52-278i. Order for attachment on defendant's application on filing set-off or counterclaim.

Any defendant in any civil action, upon filing a set-off or counterclaim containing a claim for money damages, may, at any time during the pendency of such action, apply in writing to the court before which such action is pending, or, when such court is not in session, to any judge thereof, for an order for a prejudgment remedy against the estate of the party or parties against whom such claim has been made. Such application shall be substantially in the form provided by subsection (e) of section 52-278c, adapted accordingly. A hearing

on such motion shall be held in accordance with the provisions of section 52-278d, adapted accordingly, and if the court, upon consideration of the facts before it, finds that the defendant has shown probable cause to sustain the validity of his claim, then the prejudgment remedy applied for shall be granted as requested or as modified by the court and the court shall issue such an order, directed to any proper officer, stating the amount and estate to be attached and the time of return, which order shall be served and returned in the same manner as an original writ of attachment, and when returned shall become a part of the files and records in the action. The estate attached shall be held to respond to the final judgment in the same manner as if it had been attached in an action originally brought for the recovery of the amount claimed in such set-off or counterclaim. The provisions of section 52-278e, except subsection (a) and (b) thereof, and sections 52-278f and 52-278g, adapted accordingly, shall apply to any application for a prejudgment remedy sought under this action.

§ 52-278j. Dismissal, denial and withdrawal.

* * *

§ 52-278k. Modification of request; modification or vacation of remedy granted.

The court may, upon any application for prejudgment remedy under section 52-278c, section 52-278e, section 52-278h or section 52-282 modify the prejudgment remedy requested as may be warranted by the circumstances, and may, upon motion and after hearing, at any time modify or vacate any prejudgment remedy heretofore granted upon the presentation of evidence which would have justified such court in modifying or denying such prejudgment remedy at an initial hearing thereunder.

§ 52-278 l. Appeal; order deemed a final judgment; time; stay; effect of motion to discharge by defendant on his property.

(a) An order (1) granting or denying a prejudgment remedy following a hearing under section 52-278d, or (2) granting or denying a motion to dissolve or modify a prejudgment remedy under section 52-278e, or (3) granting or denying a motion to preserve an existing prejudgment remedy under section 52-278g shall be deemed a final judgment for purposes of appeal.

(b) No such appeal shall be taken except within seven days of the rendering of the order from which the appeal is to be taken.

(c) No such order shall be stayed by the taking of an appeal except upon the order of the judge who made such order, and any such stay shall be granted only if the party taking the appeal posts a bond, with surety, in a sum determined by such judge to be sufficient to indemnify the adverse party for any damages which may accrue as a result of such stay.

(d) If a motion to discharge such prejudgment remedy is brought by the defendant, the property affected by such remedy may be restored to the use of the defendant, if the defendant posts a bond with surety in an amount determined by such judge to be sufficient to indemnify the plaintiff for any damages which may accrue by the defendant's continued use of such property, until such time as such motion is decided. (1976, P.A. 76-401, §4, eff. June 2, 1976.)

§ 52-278m. Personal service of application or order not required where general appearance filed by other party.

* * *

§ 52-289. Attachment of corporate rights or shares

Rights or shares in the stock of any corporation, together with the dividends and profits due and growing due thereon, may be attached and taken on execution. Such attachment shall be made by leaving a true and attested copy of the process and of the accompanying complaint, with the proper endorsement thereon of the officer serving the same, with the defendant or at his usual place of abode, if within the state, and with the secretary, clerk or cashier of such corporation or, if such corporation has no secretary, clerk or cashier or if he is absent from the state, then at the principal place in the state where such corporation transacts its business or exercises its corporate powers. When an officer with a writ of attachment applies to such secretary, clerk or cashier, for the purpose of attaching such rights or shares, the secretary, clerk or cashier shall furnish him with a certificate, under his hand, in his official capacity, specifying the number of rights or shares which the defendant holds in the stock of such corporation, with the encumbrances thereon, if any, and the amount of dividends thereon due, and upon the failure of any secretary, clerk or cashier to furnish such officer with such certificate, he shall be fined not more than two hundred dollars. Such rights or shares, together with the dividends and profits, shall be held to respond to the judgment which may be recovered in such action for sixty days after its rendition; but no attachment of shares of stock for which a certificate is outstanding shall be valid until such certificate is actually seized by the officer making the attachment, or is surrendered to the corporation which issued it. (1949 Rev., § 8031; 1959, P.A. 574, § 5.)

Historical Note

Derivation:

1930 Rev. § 5720.
1918 Rev. § 5869.
1917 P.A. chs. 7, 325.
1902 Rev. § 833.

1959 Public Act 574, § 5, effective October 1, 1961, deleted the words "or its transfer by the holder enjoined" from the end of the section.

§ 42a-8-317. Attachment or levy upon security

(1) No attachment or levy upon a security or any share or other interest evidenced thereby which is outstanding shall be valid until the security is actually seized by the officer making the attachment or levy but a security which has been surrendered to the issuer may be attached or levied at the source.

(2) A creditor whose debtor is the owner of a security shall be entitled to such aid from courts of appropriate jurisdiction, by injunction or otherwise, in reaching such security or in satisfying the claim by means thereof as is allowed at law or in equity in regard to property which cannot readily be attached or levied upon by ordinary legal process. (1959, P.A. 133, § 8-317, effective Oct. 1, 1961.)

§ 52-367. Levy on corporate stock

The levy of an execution on the rights or shares which any person owns in the stock of any corporation, together with the interest, dividends and profits, due and growing due thereon, shall be by leaving a true and attested copy thereof with the secretary, clerk or cashier, with an attested certificate, by the officer making such levy, that he levies upon such rights or shares to satisfy such execution; but when any bank incorporated by this state, or any banking association located and transacting business in this state, has no cashier or the cashier is absent therefrom, or any other corporation incorporated under the laws of this state has no secretary or clerk therein, the officer shall leave the copy of the execution, and the certificate in this section prescribed, at the principal house or place in this state where such corporation transacts its business or exercises its corporate powers. When any proper officer, with a writ of execution, applies to such secretary, clerk or cashier, for the purpose of so levying upon such rights or shares, the secretary, clerk or cashier shall furnish him with a certificate under his hand, in his official capacity, stating the number of rights or shares the defendant holds in the stock of such corporation, with the encumbrances thereon, if any, and the amount of dividends thereon due. Thereupon such officer shall, as in other cases, post and sell the same, together with such interest, dividends and profits, or such part thereof as is sufficient to satisfy such execution; and shall give to the purchaser a written conveyance of such rights or shares; and shall also leave with such secretary, clerk or cashier a true and attested copy of the execution and of his return thereon; and the purchaser shall thereupon be entitled to all dividends and stock, and to the same privileges as a member of such corporation as such debtor was entitled to; but no levy upon shares of stock for which a certificate is outstanding shall be valid until such certificate is actually seized by the officer making the levy, or is surrendered to the corporation which issued it. (1949 Rev., § 8110; 1959, P.A. 574, § 6.)

Historical Note

Derivation:

1930, Rev. § 5799.
1918, Rev. § 5951.
1917, P.A. ch. 325.
1902, Rev. § 915.

1959 Public Act 574, § 6, effective October 1, 1961, deleted the words "or its transfer by the holder is enjoined" from the end of the section.

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

No. 77-7026

Inter-Regional Financial Group, Inc.,
Plaintiff-Appellee

v.
Cyrus Hashemi,

Defendant-Appellant

AFFIDAVIT OF SERVICE BY MAIL

Patricia D. O'Hara, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 51 West 70th Street,
New York, New York 10023

That on the 28th day of February, 1977, deponent served the within Brief for Appellant
upon Paul E. Knag, Esqs., Cummings & Lockwood, One Atlantic Street, Stamford,
Connecticut 06904

Plaintiff-
Attorney(s) for the Appellee in the action, the address designated by said attorney(s) for the purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in a post office official depository under the exclusive care and custody of the United States Post Office department within the State of New York.

Sworn to before me,

This 28th day of February 1977

Edward A. Quimby

Patricia D. O'Hara
EDWARD A. QUIMBY
Notary Public, State of New York
No. 24-3183500
Qualified in Kings County
Commission Expires March 30, 1977